

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SOUTH CAROLINA COASTAL)	
CONSERVATION LEAGUE,)	
)	
Plaintiff,)	C.A. No. _____
)	
v.)	
)	
FEDERAL HIGHWAY ADMINISTRATION,)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
Defendant.)	
)	
_____)	

INTRODUCTION

1. In this complaint, Plaintiff South Carolina Coastal Conservation League (“League” or “Plaintiff”) alleges violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by the Federal Highway Administration (“FHWA” or “Defendant”) for refusing to release records and denying a request for a fee waiver relating to a proposed marine container terminal and highway project in Charleston, South Carolina.

2. On November 20, 2007, Plaintiff filed an action in this Court (Civil Action No. 2:07-CV-03802-PMD) seeking declaratory and injunctive relief for the issuance of permits by the U.S. Army Corps of Engineers (the “Corps”) for a marine container terminal and highway project (hereinafter referred to as the “Project”) in violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, et seq. Plaintiff filed its first amended complaint on March 31, 2008 to add claims alleging that the Project also violated the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251, et seq.; the Rivers and Harbors Act of 1899 (“RHA”), 33 U.S.C. § 403; and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, et seq., after the expiration of

the mandatory 60-day notice period for some of these claims. See Civil Action No. 2:07-CV-03802-PMD, Doc. at 28. The Project consists of three components: (1) a new 300-acre marine cargo container terminal at the former Charleston Naval Base; (2) a new four-lane access road that will connect the terminal to Interstate 26 (“I-26”); and (3) two new additional lanes for I-26.

3. On August 8, 2007, the Southern Environmental Law Center (“SELC”) submitted, on behalf of the League, a FOIA request to FHWA for records related to the Project and requested a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). After FHWA produced an incomplete set of responsive documents and denied the fee waiver request, the League filed a timely appeal within the FHWA on November 26, 2007, seeking to overturn the improper withholding of records and the denial of the League’s request for a fee waiver. As of the date of the filing of this complaint, FHWA has failed to resolve the League’s administrative appeal, in violation of FOIA.

4. The League seeks a declaration that FHWA has violated FOIA by refusing to produce responsive records and by denying the requested fee waiver; an injunction ordering Defendant to provide those records at no cost as expeditiously as possible; and an award to include reimbursement for photocopying costs already paid, the League’s reasonable attorney fees, and other litigation costs incurred in bringing this action.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

6. Venue lies in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) (Plaintiff resides in the District of South Carolina).

PARTIES

7. Plaintiff South Carolina Coastal Conservation League is a not-for-profit corporation founded in 1989. The League is incorporated under the laws of South Carolina, and maintains its headquarters office in Charleston, South Carolina. Its mission is to protect the natural environment of the South Carolina coastal plain and to enhance the quality of life of South Carolina communities by working with individuals, businesses, and government to ensure balanced solutions. The League currently has approximately 4,000 members, many of whom live in and around Charleston, South Carolina, and are affected by the air quality and growth patterns in the region, including members who reside, work, travel, and otherwise engage in a variety of activities in Charleston near the site of the proposed marine container terminal, its proposed access road, and the related proposed changes to the I-26 corridor through Charleston. These members also use the roads, waterways, and other public spaces in and around the Port of Charleston and the I-26 corridor for traveling, boating, fishing, recreation, wildlife viewing and education, and aesthetic and spiritual enjoyment. The League's access to government information concerning the Project is essential in order for the League to fulfill its mission.

8. The League brings this action on its own behalf, and on behalf of its members. The League and its members have been and continue to be injured by Defendant's refusal to provide responsive records and by the improper denial of the League's fee waiver request. The relief requested herein will redress Plaintiff's injury.

9. Defendant Federal Highway Administration is an agency within the United States Department of Transportation. FHWA is a federal agency within the meaning of FOIA and has possession or control of the records Plaintiff seeks in this action.

STATUTORY FRAMEWORK

10. FOIA requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. §§ 552(a)(3)(A), 552(b). The agency bears the burden of establishing an exemption's applicability. 5 U.S.C. § 552(a)(4)(B).

11. Upon receiving a FOIA request, an agency has twenty working days to respond. 5 U.S.C. § 552(a)(6)(A)(i). If the agency denies the FOIA request, the requester is entitled to appeal the determination within thirty days to a higher-level decision-maker within the agency. FOIA requires the agency to rule on an appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). Although an agency may grant itself an extension, "in unusual circumstances," to the time allotted for an initial response or an appeal determination, such extensions may not exceed ten working days. 5 U.S.C. § 552(a)(6)(B)(i).

12. A requester is entitled to a waiver of fees associated with responding to a FOIA request when the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

13. Under FOIA, an agency may withhold from disclosure responsive inter- or intra-agency documents that would not be available by law to a party in litigation with the agency. 5 U.S.C. § 552(b)(5) ("FOIA Exemption 5"). FOIA Exemption 5 is restricted to "inter-agency and intra-agency memorandums or letters," that is, communications shared within or between federal agencies. 5 U.S.C. § 552(b)(5). The exemption is waived if protected documents are disclosed to third parties, as is the case when "communications are disclosed to private individuals or nonfederal agencies." Chivilis v. SEC, 673 F.2d 1205, 1212 (11th Cir. 1982). When protected

documents are made available to some third parties, they must be made available to others under FOIA. Shell Oil Co. v. IRS, 772 F. Supp. 202, 209 (D. Del. 1991) (“Where an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated ‘confidential,’ the government waives any claim that the information is exempt from disclosure under the deliberative process privilege”). Moreover, documents and communications dated after a decision has been made by an agency are not protected by Exemption 5. NLRB v. Sears, Robuck & Co., 421 U.S. 132, 151-53 (1975).

14. When an agency denies, in whole or in part, a request for records under FOIA, the agency must provide any “reasonably segregable portion” of each record after deleting any portions that are exempt under the statute. 5 U.S.C. § 552(b).

15. FOIA expressly provides that a requester “shall be deemed to have exhausted his administrative remedies ... if the agency fails to comply with the applicable time limit provisions” governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

16. FOIA provides this Court with “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

17. FOIA permits the Court to assess “reasonable attorney fees and other litigation costs reasonably incurred in any case” in which the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E)(i).

FACTS

18. On or about April 26, 2007, the Corps issued a permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (permit number 2003-1T-016) that granted the S.C. State Ports Authority’s application for a permit for the marine container

terminal, accompanied by a Record of Decision that approved both the marine container terminal and the terminal access road.

19. On or about April 25, 2007, the Corps proffered the permit for the access roadway to the South Carolina Department of Transportation (“SCDOT”) for its review and signature. SCDOT signed and returned the permit to the Corps in September 2007, and that permit for the access road (permit number 2005-1N-440) is final and effective.

20. The Record of Decision issued by the Corps on April 26, 2007 constitutes a final agency action approving both the terminal and the access road.

21. FHWA was involved in reviewing the proposed port access roadway and its interconnection with Interstate 26 in Charleston. Specifically, FHWA has been involved in the analysis of the impact of that roadway on I-26 and the need to modify and add interchanges along I-26 in the vicinity of the access roadway. At the same time, FHWA has been involved in analyzing proposals to widen or expand I-26 in the vicinity to accommodate more traffic, including traffic generated by a new container shipping terminal at the Charleston Naval Complex.

22. On August 8, 2007, SELC submitted a FOIA request on behalf of the League to FHWA seeking records related to the Project. A copy of that request is included at Exhibit 1.

23. The League’s request included a fee waiver request pursuant to FOIA’s public interest exception, 5 U.S.C. § 552(a)(4)(A)(iii). The fee waiver request explained that the disclosure of the requested materials is not in the commercial interest of the League and would be in the public interest because it is likely to contribute significantly to public understanding of FHWA’s activities.

24. The League intends to disseminate the requested information to its members and

the general public in order to provide a better understanding of the Project and its impact on public health, the environment, and the economy.

25. The League agreed to a request by FHWA for an extension of time until October 5, 2007 to respond to the FOIA request.

26. On October 5, 2007, the League was given access to review a number of records, and the League identified specific records to be copied. At that time, FHWA also provided a compact disc, which included a list of e-mails it was producing to the League and copies of those e-mails. A copy of the list of produced e-mails is included at Exhibit 2.

27. On October 5, 2007, the League was also provided with an 11-page list of records (the "Initial List") that FHWA represented it planned to withhold from production. A copy of the Initial List is included at Exhibit 3.

28. The Initial List did not provide an explanation for which exemption justified the withholding. At the time it was provided to the League, FHWA did not give any notice of the right to appeal the withholding or how to appeal as required by 5 U.S.C. § 552(a)(6)(A)(i).

29. Subsequent to October 5, 2007, the League was informed orally that its request for a fee waiver for photocopying costs was denied. On October 24, 2007, FHWA provided the League, through SELC, with an estimate of \$974.90 for the costs of printing the requested records.

30. On November 14, 2007, after sending a payment of \$974.90, SELC received, on behalf of the League, copies of records that had been previously selected by the League on October 5, 2007. This production was accompanied by a cover letter dated October 24, 2007. The letter included notice of appeal rights, a list of the selected and produced documents, and a much shorter (one-page only) list (the "Final List") of records being withheld from production

pursuant to FOIA Exemption 5. A copy of the October 24, 2007 letter and the list of produced documents is included at Exhibit 4. A copy of the Final List is included at Exhibit 5.

31. There is a substantial discrepancy between the Initial List of records being withheld, which is 11 pages in length and the Final List, which consists of only one page. FHWA included many records on the Initial List that it later failed to either produce or include on the Final List of withheld documents provided on November 14, 2007. For these records, FHWA gave no explanation of which FOIA exemption justified withholding them.

32. FHWA claimed that FOIA Exemption 5 justified withholding all of the records on the Final List. Neither the Initial List nor the Final List contains enough information about each document to allow the League to determine whether Exemption 5 should apply.

33. FHWA's Final List of withheld records shows that many of the records were shared between and among FHWA employees and other recipients, including at a minimum such non-federal agency third parties as employees of the South Carolina Department of Transportation and two private companies named Wilbur Smith Associates and the LPA Group, Inc. Moreover, because the Final List only revealed one recipient for each e-mail (as opposed to the Initial List, which revealed numerous recipients for each e-mail), it is possible that many of the records on the Final List were communicated to additional recipients including employees of SCDOT, Wilbur Smith, and LPA Group, and/or other state agencies and private entities.

34. The League filed an administrative appeal relating to FHWA's improper withholding of records and its fee waiver denial on November 26, 2007.

35. FHWA failed to respond to this appeal, as required by FOIA, within twenty business days.

36. FHWA sent a letter to SELC on February 11, 2008, which states, in relevant part,

that: “[t]he FHWA is currently working on your request, which requires consultation with other components within FHWA. The FHWA’s response to your appeal will be provided as soon as possible.” A copy of this letter is included at Exhibit 6.

37. On April 29, 2007, SELC, on behalf of Plaintiff, sent a letter urging Defendant to respond to the League’s November 26, 2007 FOIA appeal. In that letter, SELC “agree[d] to continue waiting until June 9, 2008 in order for FHWA to respond to our appeal.” A copy of the April 29, 2008 letter from SELC to FHWA is included at Exhibit 7.

38. To date, neither the League nor SELC has received a substantive response to the appeal.

FIRST CLAIM FOR RELIEF
(FHWA’s Failure to Provide Responsive Documents to
the League Violates the Freedom of Information Act)

39. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

40. FHWA has violated FOIA’s mandate to release agency records to the public by failing to provide all non-exempt records or portions of records responsive to the League’s August 8, 2007 request.

41. For the records that FHWA included on the Initial List of withheld documents that it later failed to either produce or include on the Final List of withheld documents, FHWA has violated FOIA by withholding these records and by giving no explanation for which FOIA exemption might justify withholding them.

42. In addition, with regard to many other withheld documents, FHWA waived Exemption 5 by disclosing records to state agencies and private corporations. SCDOT, Wilbur Smith, and the LPA Group are non-federal parties. As a result, records that FHWA shared with

SCDOT, Wilbur Smith, LPA Group, and any other state agency or private corporation are not “inter-agency and intra-agency memorandums or letters.”

43. Records withheld by FHWA that relate to the marine container terminal and the terminal access road and were created after April 26, 2007 – the date of the Corps’ Record of Decision for the marine container terminal and the terminal access road – are not protected as “predecisional.” Rather, these records are “post-decisional,” and are not protected by FOIA Exemption 5.

44. FHWA’s failure to respond to the League’s November 26, 2007, administrative FOIA appeal within twenty working days violates 5 U.S.C. § 552(a)(6)(A)(ii).

45. The League is entitled to receive copies of the requested records as expeditiously as possible and at no cost.

SECOND CLAIM FOR RELIEF
(FHWA’s Failure to Provide a Fee Waiver to
the League Violates the Freedom of Information Act)

46. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

47. By denying the League’s request for a fee waiver, which was part of the League’s August 8, 2007 FOIA request, FHWA has violated FOIA’s mandate to provide documents without charge when the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

48. FHWA’s failure to respond to the League’s November 26, 2007, FOIA appeal within twenty working days violates 5 U.S.C. § 552(a)(6)(A)(ii).

49. The League is entitled to obtain the requested records within ten days at no cost.

50. The League is entitled to a refund of the \$974.90 in fees already improperly collected by FHWA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment as follows:

- A. Declaring that Defendant has violated FOIA by failing to release records responsive to Plaintiff's FOIA request that are not exempt from disclosure under FOIA;
- B. Declare that FHWA has violated FOIA by unlawfully denying a request for fee waiver in the League's August 8, 2007 FOIA request;
- C. Directing Defendant to provide copies of all non-exempt records to Plaintiff within ten days;
- D. Directing Defendant to refund the \$974.90 in fees already improperly collected from Plaintiff,
- E. Awarding Plaintiff its litigation costs and reasonable attorneys' fees in this action; and
- F. Granting such other relief as the Court may deem just and proper.

Respectfully submitted this the 10th day of July, 2008.

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